

MARY-LOUISE ZANONI
P.O. Box 29, 19 Market Street
Potsdam, New York 13676
315-265-2800

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Regulatory Analysis and Development
PPD
APHIS
Station 3C71
4700 River Road, Unit 118
Riverdale, MD 20737-1238

Re: Agency Docket Number: 05-015-1

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Comments on NAIS “Draft Program Standards” and “Draft Strategic Plan”

June 29, 2005

Introduction

I practice law in St. Lawrence County, a leading dairy-producing region of New York State. I am also the Executive Director of Farm for Life, a nonprofit group supporting small-scale and sustainable farmers, and citizens who raise livestock and crops for their own food. (We refer to this last category as “home farmers.”)

I have carefully examined the Draft Program Standards (Standards) and Draft Strategic Plan (Plan) issued by the USDA (the Department) on April 25, 2005, in furtherance of the Department’s proposed National Animal Identification System (NAIS). Many aspects of the Standards and Plan appear to create insurmountable legal, fiscal, and logistical problems. The comments below address five categories of problems: (1) constitutional infirmities of the proposed program; (2) an enormous economic cost to animal owners, the States, the Department, and, ultimately, to American taxpayers and consumers for a program likely to be ineffectual; (3) weaknesses in the stated rationales for the program; (4) a lack of consideration of alternative, far cheaper and more easily administered measures which would more effectively protect animal health and food security; and (5) a lack of notice and an opportunity to be heard for medium-scale, small-scale, and home farmers, and for other citizens owning livestock solely for their own use or pleasure, in the Department’s process thus far.

1. The Standards and Plan Violate Many Provisions of the Constitution.

First Amendment Violations. Many Christians (as well as persons of other religious beliefs) cannot comply with the Department’s proposed program because it violates their First Amendment right to free exercise. For example, the Old Order Amish believe they are prohibited from registering their farms or animals in the proposed program due to, inter alia, Scriptural prohibitions. The way of life of these devout Christians requires them to use horses for transportation, support themselves by simple methods of dairy farming (most ship milk to cheese producers, since their faith prohibits the use of the technologies required for modern fluid milk production), and raise animals for the family’s own food. The proposed NAIS would place the Amish and other people of faith in an untenable position of violating one or another requirement of their most important beliefs. Further, it is not unlikely that enactment of the NAIS as presently proposed would force the Amish and other devout people to seek migration to another nation. It would greatly injure the status of our country among the community of nations if the Department’s actions were to result in the forced migration of such simple, devout, and peaceful people.

Fourth Amendment Violations. The Department proposes surveillance of every property where even a single animal of any livestock species is kept; and to require, at a minimum, the radio-frequency identification tagging of every animal. (Standards, pp. 3-4, 6, 17-18.) Perhaps the Department had in mind as its model large commercial facilities where thousands, or in many cases tens of thousands, of animals are housed or processed. However, aside from large livestock businesses, there are also tens of millions of individual American citizens who own a pet horse, keep a half-dozen laying hens, or raise one steer, pig, or lamb for their own food. In these instances, the “premises” that the Department plans to subject to GPS satellite surveillance (Standards, p. 10) and distance radio-frequency reading (Standards, p. 27) are the homes of these tens of millions of citizens. The government is not permitted to use sense-enhancing technologies to invade the privacy of citizens’ homes. Kyllo v. United States, 533 U.S. 27 (2001). The sanctity of the home is entitled to privacy protection in circumstances where an industrial complex is not. See Dow Chemical v. United States, 476 U.S. 227, 238 (1986). Therefore, the Department should abandon its present proposals, insofar as they entail enormously intrusive surveillance against unsuspecting innocent citizens who have done nothing more than to own an animal (a common form of personal property under the American system of law).

Fifth and Fourteenth Amendment Violations. The proposed NAIS is the first attempt by the federal government at forced registration in a huge, permanent federal database of individual citizens’ real property (the homes and farms where animals are kept) and personal property (the animals themselves). (Standards, pp. 8-13; Plan, pp. 8, 12-13.) Indeed, the only general systems of permanent registration of personal property in the United States are systems administered by the individual states for two items that are highly dangerous if misused: motor vehicles and guns. It is difficult to imagine any acceptable basis for the Department to subject the owner of a chicken to more intrusive

surveillance than the owner of a gun. For example, whereas the owner of a long gun generally can take the gun and go hunting beyond the confines of his or her own property without notifying the government, the Department proposes that the chicken owner, under pain of unspecified “enforcement,” must report within 24 hours any instance of a chicken leaving or returning to the registered property. (Standards, pp. 13, 18-19, 21; Plan, p. 17.)

Even more important than the trammeling of basic property rights under the program is the insult to fundamental human rights which must remain free from government interference. See Lawrence v. Texas, 539 U.S. 558, 565 (2003). These fundamental human rights include decisions about nutrition and bodily integrity. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990); Rochin v. California, 342 U.S. 165 (1952). Surely it is overreaching for the Department to propose, as it has, the constant surveillance of one’s home and animals when the citizen is only attempting to raise food for the household or for a limited local area, and there is no intention of distributing the food on a wider scale.

The foregoing numerous constitutional infirmities are bound to enmesh the Department and state governments in extremely costly litigation for years to come. Therefore, please reconsider the Department’s plans to institute a program so at odds with fundamental American values.

2. Practical and Cost Impediments to Enforcement.

As discussed more fully below (see no. 5, Lack of Notice), most owners of a small number of livestock are not even aware of the USDA’s proposals at present (see, e.g., “Helping to Head Off A Livestock I.D. Crisis,” Lancaster Farming, May 28, 2005, p. A38, discussing difficulties of informing all farmers of the NAIS requirements). The Department does not plan to issue “alerts” to inform livestock owners of the requirements until April 2007, only eight months prior to the date when it will be mandatory to submit the GPS coordinates of one’s home and the RFID of one’s animal to the USDA database. The final rule governing mandatory home and animal surveillance will not be published until “fall 2007” (Plan, p. 10), leaving only a couple of months, at best, for notification and compliance before January 2008. The citizens apt to own small numbers of livestock are rural dwellers who have chosen their way of life partly as a means of escaping excessive corporate and government bureaucracy. These factors suggest the likelihood of a noncompliance problem of heroic proportions. In addition, the proposals call for an animal owner to report, within 24 hours, any missing animal, any missing tag, the sale of an animal, the death of an animal, the slaughter of an animal, the purchase of an animal, the movement of an animal off the farm or homestead, the movement of an animal onto the farm or homestead. (Standards, pp. 13, 18-19, 21.) The Department plans to demand the following actions by all animal owners according to the stated timeline: “January 2008: All premises registered with enforcement (regardless of livestock movements). . . . January 2008: Animal identification required with enforcement. . . . January 2009: Enforcement for the reporting of animal movements.” (Plan, p. 17; emphasis added.) Moreover, the NAIS will “prohibit any person” from removing an I.D. device, causing

the removal of an I.D. device, applying a second I.D. device, altering an I.D. device to change its number, altering an I.D. device to make its number unreadable, selling or providing an unauthorized I.D. device, and “manufacturing, selling, or providing an identification device that so closely resembles an approved device that it is likely to be mistaken for official identification.” (Standards, p. 7.)

Thousands of enforcement agents would have to be employed to find the potentially tens of millions of unregistered premises and violations of the animal identification and animal tracking requirements. Indeed, beyond the expense, the spectre of these government agents entering onto citizens’ property to find possible unregistered homes and animals brings to mind the actions of a frightening police state, not the actions of a government agency whose mission should be to assist rural people, not to hunt them down.

The proposed NAIS makes clear that animal owners will have to pay the costs of registration and surveillance of their homes, farms, and livestock. (“[T]here will be costs to producers,” Plan, p. 11; “private funding will be required. . . . Producers will identify their animals and provide necessary records to the databases. . . . All groups will need to provide labor . . .”, Plan, p. 14.) In fact, the financial and labor requirements for animal owners would be huge. Livestock owners, even the owner of one pet horse who takes rides off the property, would have to invest in RFID reading devices and software to report information. The Standards and Plan do not enlighten us about the amount of these costs. Many rural people do not have (and do not want) computers at home and even those who have them often cannot get high-speed connections. Even if some system of written or manual reporting were allowed as an alternative, this would only greatly increase the labor required for citizens who elected it. Indeed, with or without access to technology, the labor requirement would be huge.

Consider a small-to-moderate size dairy, milking 160 head. A total of about 150 cattle (75 bull calves, 50 cull cows, and 25 excess heifers) would leave such a farm each year. The farmer would be required to report each tagging of an animal and each event of an animal shipped off the farm (300 reportable events). Plus let’s assume that the farmer has 50 growing heifers outside during pasture season, and, as heifers are prone to do, they breach the fence and go off into the neighbor’s fields twice during the season, and the farmer has to herd them back. This results in an additional 250 reportable events – 50 instances of heifers having to be tagged (strictly speaking, the rules would require tagging before they leave the farm -- Plan, p. 8 -- one hopes the enforcement agents might overlook the technical violation of the farmer perhaps not being able to tag them until they are herded back), plus 100 instances of individual heifers leaving the farm, and 100 instances of individual heifers returning to the farm. The farmer now has at least 550 total reportable events, or an average of over 1.5 times per day, 365 days per year, that the farmer must interrupt his or her other work and submit data on premises identification, animal identification, and an event code to the USDA’s database. Further, the animals shipped from this farm would generate at least an additional 600 reportable events per year for other stakeholders (i.e., 75 bull calves into and out of the auction house, then onto a veal farm, off the veal farm, and to a slaughter facility (375 events); 50

cull cows into and out of the auction house, then to a slaughter facility (150 events); and 25 heifers into and out of the auction house, then onto new farms (75 events). Thus, only one modest-sized farm would generate well over a thousand events per year requiring recordkeeping and reporting.

Indeed, the only economic advantage of the NAIS is an advantage to the corporations that manufacture high-tech tags, ID equipment, and the vast amount of hardware and software required for the system. This “advantage” is totally outweighed by the economic costs to both large and small segments of the livestock industry and the social and civil-rights costs to small producers, home farmers, and non-farming animal owners. The Department’s mission should be to protect and foster agriculture, not to protect and foster manufacturers of tagging and computing equipment.

3. Infirmities in Supposed Justifications.

The primary justifications given by the Department for the NAIS are animal health issues, specifically, foot-and-mouth disease (FMD) and bovine spongiform encephalopathy (BSE). (Plan, p. 1.)

There has been no FMD in the United States for over 70 years and the possibility of its reintroduction is speculative. Of course, FMD is a viral disease exclusively of cloven-hoofed animals and does not infect humans. Moreover, FMD is primarily an economic disease. Animals may become temporarily lame or refuse to eat because of the lesions caused by the virus, but nearly all animals recover within a few weeks. Thus, the primary effects are a setback in weight gain for animals produced for meat, reduced lactation in dairy animals, and restrictions on exports for countries where FMD is present. NAIS proponents need to carefully consider whether a disease of no risk to humans, not present in the United States, and only of temporary effect to animals, can possibly justify a gravely flawed system such as the proposed NAIS.

There have been only two known cases of BSE in the United States. There have been no cases of humans contracting, while within the United States, the related condition of variant Creutzfeldt-Jakob disease. The Department has put into place all necessary safeguards and assures that the American beef supply is safe and that transmission of BSE prions to humans cannot now occur in the United States. After the banning of meat and bone meal from ruminant feeds in 1997, any possible instances of BSE would now occur only in relatively old cattle. Obviously, the number of such cattle diminishes yearly and even assuming the longest potential lifespan of cattle, any slight possibility of BSE in the U.S. cattle herd will disappear in about 12 to 15 years. Thus, BSE is a very low-incidence, self-limiting, rapidly disappearing disease in the United States. BSE has not resulted in transmission of a single case of human disease in the United States. BSE is, rather than a health threat, primarily an economic problem affecting exports and imports of cattle and beef. It is apparent that the Department’s position that sufficient controls are in place is correct. Thus, as with FMD, BSE cannot justify the creation of a huge, permanent, expensive, and intrusive NAIS.

A further asserted justification is the risk of “an intentional introduction of an animal disease.” (Plan, p. 7.) Far from preventing deliberate interference with the livestock industry or food supply, the proposed plan creates numerous new opportunities for mayhem. The Department’s own proposals suggest that the counterfeiting and theft of tags will quickly become a problem. (Standards, p. 7.) Application of counterfeit tags could easily mask the introduction of a sick animal into a facility containing thousands or tens of thousands of other animals. Consider also the scenario in which someone brings a sick animal to a slaughter facility and falsely reports its farm of origin as a large operation with tens of thousands of animals in production. The resulting baseless scare has the potential to create a huge disruption of food supplies and the profitability of animal agriculture, regardless of whether the hoax might ultimately be discovered.

4. Lack of Consideration of Alternate Methods.

As discussed above, the NAIS is a violation of civil rights, extremely expensive and burdensome, likely to be ineffective, and not justified by human health, animal health, or food safety considerations. Given these numerous and probably insurmountable flaws, the Department should carefully consider alternative methods that would be much more successful in accomplishing the stated objectives.

The security of America’s food supply and the resilience of livestock in the face of diseases are best served by the decentralization and dispersal of food production and processing, and of the breeding and maintaining of livestock. If more citizens could depend on food raised and processed within, say, 100 miles of their homes, the danger of large-scale disruptions would be minimized, the costs of transport would be less affected by volatile fuel prices, and any food-borne diseases that might occur would be contained by the natural geographic limits of the system. Similarly, if animals, such as cattle, for example, are kept in small herds of, say, ten to a hundred animals, infectious diseases will have much more difficulty in spreading beyond a discrete geographical area. In this regard, the NAIS would actually be counterproductive, since it would tend to drive more small producers and small processors out of business. Thus, the Department should consider an approach and programs to support and promote smaller, local herds and local food processing.

Smaller herds would also entail the possibility of many more closed herds than our agricultural model supports at present. Especially in dairy operations, where artificial insemination is the norm, only modest government incentives would be necessary to encourage small and medium sized producers to maintain closed herds. In the case of beef cattle, and of other species not commonly using AI, a state-level program requiring vet checks and recordkeeping for new animals introduced to herds would be obviously far simpler, as well as more effective, than the proposed NAIS.

Another contribution the Department could make to food safety and animal health at low cost would be the encouragement of integrated producer/processor operations. Despite economic and marketing forces that are stacked against them, many small producers throughout the United States still process and market their own dairy products,

or raise meat that is processed on site or at small local slaughterhouses and distributed directly to consumers or to local retail outlets. Consumers love not only the high quality of such products, but also the assurance that comes from actually knowing the farmers who, for example, finish their steers on grass and have the butchering done at a local small business. Very modest programs of financial incentives and encouragements to the streamlining of federal and state permitting procedures would help this hopeful segment of our nation’s agriculture to flourish.

Many recent developments in the agricultural sciences have demonstrated time and again that the least-cost and least intrusive method is the most effective and protective of health. For example, leading-edge research now rejects the routine deworming of all cattle and sheep, in favor of eliminating parasite-susceptible individuals as breeding stock. The once-heralded approach of routine deworming, it turns out, only resulted in resistant super-parasites and perpetuation in the gene pool of animal families naturally subject to the largest infestations. Similarly, in recent years our thinking has done an about-face on the subject of routine use of antibiotics in the feed of beef steers and dairy heifers, and in udder infusions for dry dairy cows who exhibit no clinical mastitis. Once heralded as a means of increasing weight gain and providing extra insurance against fresh-cow mastitis, those routine uses of antibiotics in healthy animals are now rejected because they are known to produce resistant super-bacteria that may cause not only animal infections, but human infections. Unfortunately, it takes years for knowledge gained in the latest research to reach the farmer, and the inappropriate overuse of anthelmintics and antibiotics is still very common. Thus, another low-cost and simple initiative the Department could undertake would be an intensive educational initiative to end the inappropriate use of drugs in animal agriculture.

The foregoing are just a few of the many possible more effective animal-health and food-safety initiatives to which the Department could devote its finite resources. It is appropriate for the Department to study fully these alternatives before concluding that a bloated NAIS bureaucracy is our only alternative.

5. Lack of Notice and an Opportunity to be Heard for Small Farmers and Animal Owners.

The original impetus for a nationwide animal I.D. program came from a private membership group, the National Institute for Animal Agriculture (NIAA). (Plan, pp. 1, 4.) The members of the NIAA include such well-known industry entities as Cargill Meat Solutions, Monsanto Company, Schering-Plough, and the National Pork Producers Council. Further, of those NIAA members listed as “National Associations and Commercial Organizations,” nearly 25% appear to be manufacturers and marketers of identification technology systems. (animalagriculture.org/aboutNIAA/members/memberdirectory.asp). In April 2002, the NIAA “initiated meetings that led to the development of” the NAIS. (Plan, p. 1.) The NIAA “established a task force to provide leadership in creating an animal identification plan.” (Plan, p. 4.) The NIAA already had been promoting animal I.D. for months before the Department, through APHIS, became involved in the effort. Moreover, the Department says that “[t]he development of [the

Draft Program Standards] was facilitated by significant industry feedback.” (Standards, p. 1.) Essentially, a private group has dominated animal I.D. thinking and has dictated the NAIS plan now being proposed by the Department.

Moreover, the Department asserts a “broad support for NAIS” (Plan, p. 1) when there is no such support. The Department says that it conducted “listening sessions” for six months (June-November 2004) on NAIS. However, only 60 comments were apparently made during these six months of sessions. If the Department had made a truly widespread attempt to determine citizens’ views on animal I.D., surely it would have received far more than 60 comments on an issue that affects tens of millions of Americans.

The Department relies upon the NIAA’s survey of itself as supposed evidence of public support. (Plan, p. 7.) The Department quotes responses from the survey and cites animalagriculture.org/survey/NAIS.htm as its source. (Id.) However, when one visits that page, one finds a statement by the NIAA that the survey is not scientific, that the survey’s results are intended for use by NIAA members only, and that any reproduction of the survey is prohibited. Thus, the Department is presenting as “evidence” a private, unscientific report that the public is forbidden to quote in opposition. To correct this gross violation of normal agency procedure, the Department must immediately publish this entire NIAA survey in the docket and issue a press release specifying that the public is permitted to use the survey freely in studying the relationship of the NIAA to the genesis of the NAIS. This is not only a spurious example of “public support” but an affirmatively misleading rationale for a mandatory NAIS. It tells us nothing about truly public support to say that the NIAA, an organization of the largest livestock businesses and manufacturers of identification equipment, considers mandatory I.D. to be good for its own private interests.

One further troubling instance of the failure to consider the needs of the larger public deserves mention. The NIAA lists as public institutional members some state departments of agriculture and animal health commissions. These include representatives of several states with significant populations of members of plain faiths, e.g., Pennsylvania, New York, Ohio, Indiana, Michigan, Wisconsin, Missouri, Iowa. Yet it appears no consideration whatsoever was given to the fact that the NAIS as proposed would violate the right of these citizens to practice their religion without government hindrance. Thus, the NAIS is not the result of any true consensus or concern for the welfare of the citizenry as a whole. Rather, the NAIS is the predictable result of allowing a small coterie of financially-interested “stakeholders” to create the agenda for animal identification.

Conclusion

The NAIS proposals as embodied in the Standards and Plan are unworkable because of economic costs, the huge burdens of reporting, and enormous and needless complexity. Their justifications based on animal diseases and food safety would not be

served but in fact would be harmed by the NAIS. The Department has failed to consider numerous alternative methods that might actually further animal health and food security without the vast problems of the proposed NAIS. The Department has limited any input on the NAIS chiefly to a small group of parties with a preexisting bias toward mandatory animal ID; the Department did not make its plans known to small farming interest groups and did not seek any input from such groups. Last, and first, the most fatal flaw of the proposed NAIS is its disregard for fundamental human rights enshrined in our Constitution: the right to religious freedom, the right of property ownership, the right of privacy.

Not since Prohibition has any government agency attempted to enshrine in law a system which so thoroughly stigmatizes and burdens common, everyday behavior and is so certain to meet with huge resistance from the citizens it unjustly targets. Therefore, the Department should: (1) withdraw the present Standards and Plan as failing to embody a fair or workable system; (2) reconsider whether, particularly in light of the present effective measures against BSE, any animal I.D. scheme is warranted at present; (3) consider implementing the low cost and easily undertaken measures that would more effectively protect animal health, human health, and the food supply; (4) review its procedures for development of programs such as NAIS to correct the limitation of input to self-selected groups and the failure to notify the vast majority of affected parties; and (5) institute procedures to assure that, in the future, proposed programs will not be permitted to threaten the constitutional rights of citizens.

Very truly yours,

Mary-Louise Zanoni